

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 2002-196

August 8, 2002

KENNEBUNK LIGHT & POWER DISTRICT  
Petition for Approval to Furnish and Extend Retail  
Electric Service in the Entire Town of Kennebunk

EXAMINER'S REPORT

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NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses or exceptions to this Report on or before **August 21, 2002**.

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**I. SUMMARY**

We conclude, based on the circumstances stated in its petition, that the Kennebunk Light & Power District (KLPD or District) could potentially present a case that would support the granting of authority for the District to serve the entire Town of Kennebunk. Accordingly, this proceeding should continue so that a full record can be developed upon which final determinations can be made.

**II. BACKGROUND**

On April 8, 2002, KLPD filed a petition, pursuant to 35-A M.R.S.A. § 2110, for a Commission declaration that the public convenience and necessity require KLPD to be authorized to furnish electric service throughout the entire Town of Kennebunk. The declaration would authorize KLPD to extend its service into the southeastern area of Kennebunk. This portion of the Town is currently served by Central Maine Power Company (CMP).

In its petition, KLPD argues that all criteria for a declaration of public convenience and necessity are satisfied under the circumstances of this case. KLPD states it does not seek authorization to exercise eminent domain with respect to CMP's facilities, that any transfer of service would occur by action of the affected customer, and any transfer of facilities from CMP to KLPD would occur by a negotiated lease or purchase and sale.

KLPD also requests that the Commission make several findings to avoid "undue detriment" to CMP ratepayers. These are that any transferred customers continue to pay generation-related stranded costs as determined by the Commission pursuant to 35-A M.R.S.A. § 3208, and that no other stranded costs would be imposed as a result of the extension of service. According to KLPD, CMP would be fully compensated for other costs by payment for network transmission service and for any facilities at a fair value.

KLPD requests that the Commission determine in this proceeding a *pro forma* valuation of the electric distribution system in the southeastern area of Kennebunk. This valuation could then be used as a benchmark for the reasonableness of the price of facilities that CMP may choose to sell to the District and for assessing the prudence of decisions by CMP not to sell facilities in face of a reasonable offer.

The Commission convened a preliminary conference of parties on May 16, 2002. At the conference, the following petitions for intervention were granted: CMP, the Public Advocate, Town of Kennebunk, Citizens for Electrical Equity in Kennebunk, Maine Public Service Company (MPS), Bangor Hydro-Electric Company (BHE) and Eastern

Maine Electric Cooperative (EMEC).<sup>1</sup> During the conference, parties agreed that the Commission should address several threshold issues, primarily to determine whether, under current law, a declaration of convenience and necessity could issue upon the circumstances presented in the District's petition.

On May 21, 2002, the Examiners issued a procedural order requesting the parties to brief several threshold issues related to the standards for a finding of public convenience and necessity for a second utility to provide service. Specifically, the parties were asked to present argument on whether the Commission may consider "local self-determination" as a ground for granting authority and whether CMP's service must be found to be inadequate to grant the District's petition. The parties were also asked whether the Commission may require CMP to sell its distribution assets or establish an "imprudence price" for distribution assets (a price at which CMP would be imprudent for refusing to sell). Finally, the procedural order asked the parties to discuss whether the Commission may, as a condition for granting authority to KL&PD, require the District to pay certain amounts designed to leave CMP (and its ratepayers) financially unharmed.

### **III. COMMENTS OF PARTIES**

#### **A. KLPD**

KLPD claims that the circumstances of this case satisfy the "public need" requirement for a declaration of public convenience and necessity. KLPD argues that

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<sup>1</sup> The MPS and BHE interventions are limited to providing argument. EMEC may participate in all aspects of the proceeding, but must request approval to file testimony to assure relevance and the lack of duplication.

“public need” equates to a “public demand” for the services sought to be provided by a second utility and that “local self-determination” is a ground for granting authority to the second utility under the public need requirement.

In support of its local self-determination argument, KLPD states that all the residents of the entire Town (including those not served by KLPD) are potentially liable for KLPD's obligations; are subject to taxation to support KLPD's debts; may vote for, and are eligible to serve as, KLPD's trustees; and are entitled to vote on KLPD issues that are required to be decided at a town meeting. Thus, according to KLPD, electric customers who live in the Town and who are presently served by CMP justifiably desire to unite their responsibilities as part of the KLPD “body politic and corporate” with the tangible benefits of receiving service by KLPD.

KLPD's position is that the Commission is not required to find that CMP's service is inadequate or that its rates are unreasonable. Rather, KLPD argues that Commission need only find that there is a demand for service from KLPD in the area in question. KLPD further argues that KLPD's service is a different type than that provided by CMP because of the differences in the organization of the two entities, and the far greater responsiveness and responsibility that KLPD has with respect to the area sought to be served. Additionally, KLPD has the capability to provide service at a lower cost and with a higher quality of service than that presently provided in the CMP-served areas of the Town.

KLPD states that its requested authorization would satisfy the requirement that adequate service at reasonable rates be promoted for all customers including those of CMP. KLPD supports this view by explaining that it does not seek authorization for

eminent domain or to require any “forced sale” of CMP assets, that transferred customers would pay generation-related stranded costs and that there would be no other stranded costs.

KLPD explains that its use of the term “prudence” in the context of the Commission establishing a valuation for CMP assets was not intended as a vehicle for compelling CMP to sell its assets. KLPD concedes that the Commission has no authority to act in such a manner. Rather, KLPD used the term “prudence” in a more limited sense in reference to CMP claims for “stranded costs” that it failed to mitigate by declining to accept a reasonable offer for its assets.

Finally, KLPD clarifies that it does not propose that the Commission act in any way to remove CMP’s present authority to serve customers within the Town of Kennebunk.

B. Town of Kennebunk

Through its comments, the Town of Kennebunk presented information from its Fire Chief showing that KLPD’s service is superior to that of CMP. Additionally, the Town states that CMP in the past has not delivered its regular services in a timely manner. The Town also requests the Commission to establish a valuation for CMP’s assets.

C. Public Advocate

The Public Advocate argues that an applicant is not necessarily required to show that the service of the incumbent utility is inadequate to demonstrate a “public need” exists for a particular service. Instead, the Public Advocate argues that a “public

need” exists if the incumbent utility fails to provide a particular service needed by the public and that there is a “public need” for comparable services at lower costs.

The Public Advocate also supports the District's position that “local self-determination” is a grounds for finding “public need,” but views that issue more as a matter of self-protection. The Public Advocate explains that residents of Kennebunk are at risk that their homes might be subject to foreclosure if KLPD defaults on its debts and that the addition of new customers will improve the financial viability of KLPD.

The Public Advocate states that the Commission may have the authority to establish an “imprudence price” and penalize CMP for not selling at that price. Essentially, the Public Advocate believes that the Commission has the authority to determine that it is in the public interest for KLPD to serve the entire Town of Kennebunk and to provide for the orderly transition through the determination of an “imprudence price.”

Finally, the Public Advocate argues that the Commission may require, as a condition for granting KLPD authority to serve, that CMP be paid amounts designed to leave CMP ratepayers harmless. This authority, according to the Public Advocate, stems from the Commission's ability to consider the impact that entry of a second utility will have on the incumbent utility.

D. CMP

CMP views this proceeding as an attempt by KLPD to obtain authority to displace CMP from serving its existing customers in Kennebunk. CMP argues that sections 2102 and 2105 reflect a legislative policy in favor of protecting a utility's actual service territory and that “public need” can only be found if: CMP voluntarily relinquishes

its service territory; the service KLPD seeks to provide is a new service that is not provided by CMP; or the service currently provided by CMP is not adequate. CMP argues that none of the necessary findings can be made in this case.

CMP disputes the District's claim that the service it seeks to provide is a new service that is not currently available. CMP states that the distribution service KLPD seeks to offer is the same service that CMP already provides, and that it is the type of entity providing the service (i.e., a municipal utility), not the type of service, that is the basis for KLPD's argument that a "public need" exists under the circumstances of this case. CMP argues that service by a municipal utility (as opposed to an investor-owned utility), which underlies the "local self-determination" argument, is not an appropriate factor in considering public convenience and necessity.

CMP also dismisses KLPD's argument concerning resident liability of the District's debt, stating that KLPD's rates are set to recover all its debt costs, and that all municipalities incur debts and obligations that are secured by resident property regardless of whether the property owner receives a direct benefit from the municipality's expenditure. CMP also notes that, under Maine law, a resident may recover the full value of sold property; so it is the Town, not the individual property owner, that ultimately backs KLPD's debts.

Because CMP does not view KLPD's service to be a new service, it argues that the Commission must find CMP's service to be inadequate before it can conclude that a "public need" exists. CMP states that lower price and better service, even if true, is not relevant to the "public need" test and allowing such considerations would eviscerate service territories and introduce competition into the distribution

sector. Because CMP is providing adequate service in Kennebunk, it argues that a "public need" does not exist for a second utility.

Finally, CMP argues that the Commission does not have the authority to require CMP to sell its distribution facilities to KLPD. Similarly, CMP argues that the Commission may not establish a "imprudence price," in that such action would be an impermissible attempt to coerce CMP to sell its assets.

E. MPS

MPS commented that, based on prior precedent, a consideration of public convenience and necessity implicates the general public interest and requires examination of variety of issues, including the potential impact on the orderly development of a stable electric industry in Maine. Thus, according to MPS, the interests of particular customers that wish to be served by a second utility must be subordinated to broader public policy issues. MPS also takes the position that "local self-determination" as discussed by KLPD cannot be considered a basis for granting KLPD's request for authority.

MPS argues that KLPD must show either that CMP is not offering a particular type of service or that an offered service is inadequate. It argues further that a demonstration that KLPD has lower rates or more reliable service than CMP is irrelevant to the determination of "need" for a second utility. MPS also agrees with CMP that the Commission does not have the authority to require CMP to sell its distribution asset or to accomplish the same purpose through setting an "imprudence price."



**F. EMEC**

EMEC comments that there is no singular or universal set of standards that applies for purposes of a finding that the public convenience and necessity require a second utility. EMEC believes that the weight given to various considerations depends on the nature of the industry and the policy objectives of the State with regard to that industry. Accordingly, EMEC argues that precedents regarding second utilities in the telecommunications industry should not control the standards to be used in this case in that the technology and economic characteristics of telecommunications are amendable to competition, while the electric distribution industry has not been affected by analogous changes.

Additionally, EMEC urges the Commission to determine standards in the context that it might really be deciding whether one utility should replace another. EMEC does not believe a simple showing by a second utility that it might have better service or lower rates justifies its authorization to serve in another utility's territory. EMEC also believes that "local self-determination" cannot be a sole ground for granting authority, but may be taken into account (with other issues, such as the impact on the existing utility's customers). Finally, EMEC argues that any authority the Commission grants to KLPD to serve should be conditioned on compensation to CMP for any harm that results.

**IV. DISCUSSION**

Based on the analysis presented below, we find that KLPD could potentially make a case that would support the granting of authority for the District to serve the

entire Town of Kennebunk. We thus conclude that this proceeding should continue so that a full record can be developed upon which final determinations can be made. We emphasize that our ruling at this preliminary stage of the proceeding should not be viewed in any way as an indication of how we might finally decide the issues of this proceeding upon a full record. We do not in this Order find that there is a "public need" for KLPD to serve the entire Town of Kennebunk, but only that the District may be able to demonstrate such need consistent with statutory requirements and precedent. We also discuss below other issues that should be addressed in this proceeding to allow us to determine whether KLPD's requested authority should be granted.

A. Standards for Authority to Provide Service

KLPD filed its petition for authority to serve the entire Town of Kennebunk pursuant to 35-A M.R.S.A. § 2110. Section 2110 states in relevant part:

A public utility organized by Private and Special Act of the Legislature may extend its services as follows:

**1. Commission authorization.** The commission may authorize a public utility organized by private and special act of Legislature to furnish or extend its service in, to or through a city or town notwithstanding any territorial limitations, express or implied, in the private and special act of the Legislature by which it was organized or under which it is enfranchised . . . .

**2. The commission's powers and limitations.** The commission's powers and limitations, made applicable under this section, are those applicable by law in like cases concerning public utilities organized under Title 13-A or any prior general corporation law.

The reference in section 2110 (formerly 35 M.R.S.A. §294) to the law applicable to "public utilities organized under Title 13-A or any prior general corporation law"

(so-called "general law" utilities) is a reference to 35-A M.R.S.A. § 2102 and 2105. See

*Biddeford & Saco Gas Co. v. Portland Gas Light Co.*, 233 A. 2d 730, 734-36 (Me. 1967). Prior to 1967, those sections (then 35 M.R.S.A. §§ 2301 and 2302) applied only to “general law” utilities. Amendments effective in 1967 applied those provisions to so-called “charter” utilities, such as KLPD, so that the sections now apply directly to all utilities. While section 2110 continues to apply on its face only to charter utilities (those organized pursuant to Private and Special Law) and continues to cross-refer to the provisions formerly applicable only to “general law” utilities (i.e., sections 2102 and 2105) for the substantive powers of the Commission with regard to a request to expand a service area, section 2110 is effectively nullified by the fact that section 2102 and 2105 now apply directly to charter utilities.<sup>2</sup>

As interpreted by the Commission and the Law Court in *Public Utilities Commission, Investigation of Authority of Madison Electric Works Pursuant to Section 1303 to Provide Service to Certain Portions of Madison, Anson, Starks and Norridgewock Without Approval Pursuant to Sections 2102 and 2105*, Docket No. 94-379 (Aug. 4, 1995), *aff'd. sub nom. Town of Madison, Dept. of Electric Works v. Public Utilities Comm'n*, 682 A.2d 231 (Me. 1996) and by the Commission in *Investigation Pursuant to 35-A M.R.S.A. § 1303 of Authority of Kennebunk Light & Power District to Provide Service in Certain Portions of Kennebunk*, sections 2102 and 2105 require either a charter or a general law utility to obtain approval to provide service to any area that the utility was not serving as of October 8, 1967 (the effective date of the 1967 amendments, including the “grandfather clause” of 35-A M.R.S.A. § 2102(2)),

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<sup>2</sup> Accordingly, it is preferable (if only to prevent the need for explanations such as the foregoing) for all utilities that wish to expand their service areas to file their requests pursuant to section 2102(1).

even though that utility was serving in other portions of the same municipality, if any other utility is providing or has authority to provide a similar service in the same municipality.

Section 2102(1) states that no public utility may furnish service in a municipality in which another utility is furnishing or authorized to furnish similar service without approval of the Commission. Section 2105 provides that approval to provide utility service in a municipality where a public utility is engaged in or authorized to provide similar service shall not be granted until the Commission makes "a declaration that the public convenience and necessity require a second public utility." Thus, as all parties agree, the primary standard for considering KLPD's petition is whether the public convenience and necessity require the District to extend its service throughout the Town of Kennebunk.

The parties also generally agree on the criteria the Commission applies in determining public convenience and necessity in "second utility" cases. A three-prong test is generally employed in such cases:

- Public need exists for the proposed service
- Applicant has the technical ability to provide the proposed service
- Applicant has the financial capability to provide the service

*Standish Telephone Co. v. Public Utilities Comm'n*, 499 A.2d 458, 459 (Me. 1985).

KLPD includes the following criteria as among those the Commission considers in these cases: whether the requested approval will promote safe, reasonable and adequate service at rates which are just and reasonable to customers and to public utilities.

CMP states that the three-prong test is considered in light of the overall general public interest. MPS and EMEC take similar positions, stating that second utility cases require

the consideration of numerous issues, including the impact of granting the requested authority on the existing utility and its ratepayers.

We agree that the general public interest is the overriding consideration in determining second utility cases and thus all issues relevant to the public interest may be considered. *Mid Maine Gas Utilities Inc., Request to Furnish Gas Service*, Docket No. 96-465 at 6-10 (Mar. 7 1997) (broad public interest standard must be considered when determining public convenience and necessity). This includes whether the requested approval will promote safe and adequate utility service at just and reasonable rates, and the potential impact of the proposed service on the existing utility and its ratepayers. *Standish Telephone*, 499 A2d at 464 (Commission considered impact on existing utilities); *Mid Maine*, Docket No. 96-465 at 8 (public interest requires consideration of a spectrum of interests). Parties are thus free to raise all issues arising from the KLPD petition that implicate that public interest.

Finally, we also agree with EMEC that consideration of the public convenience and necessity should take into account the particular technological and economic characteristics of the industry in question. Accordingly, a request by a second utility to provide service in an area already served necessarily raises questions of whether competition among utilities would lead to efficiencies or to higher costs. The resolution of such questions would depend on the nature of the proposed utility service. *Standish Telephone*, for instance, involved the resale of certain telephone services. The Court in that case noted the developing public policy in favor of promoting competition in telecommunication services and that no issues of wasteful duplication of facilities were presented. *Standish Telephone*, at 461 n.6, 464 n.8. In contrast, this

case presents the question of whether a second electric distribution utility should be authorized to serve in an area where distribution service is already being provided. At the current time, there is no national or State policy favoring the promotion of competition for electric distribution service. In addition, as discussed below, the KLPD petition raise questions regarding the potential for duplication of distribution facilities. The propriety of competition for electric distribution customers in Kennebunk and the potential for duplication of facilities are valid considerations in this case.

B. Public Need

The primary threshold issue currently before us is whether the KLPD petition can satisfy the “public need” criteria. To find public need, we must conclude that either the service provided by the current utility is inadequate or that the proposed service by the new utility is not currently provided. *Standish Telephone*, 499 A2d at 461-462; *In Re Powell*, 358 A.2d 522, 527-529 (Me. 1976). KLPD has stated that it is not arguing in this proceeding that CMP’s service is inadequate or that its rates are unjust and unreasonable.<sup>3</sup> Rather, KLPD’s “local self-determination” argument is that KLPD, by virtue of it being a municipal utility, can provide a service that is different than that currently provided by CMP. Specifically, KLPD argues that the service it can provide is subject to local control and responsive to local needs and desires as to quality of retail service and performance of distribution system operations. Additionally, if KLPD obtained authority to serve, customers could receive service from a utility for

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<sup>3</sup> Accordingly, the adequacy of CMP’s service and the reasonableness of its rates will not be at issue in this proceeding. KLPD (or other parties), however, may present a case that the District’s service is superior to that of CMP’s to the extent relevant to the claim that the District’s proposed service is of a different type than that currently provided by CMP.

whose general obligations they share potential liability. Based on the holding in *Standish Telephone*, we conclude that KLPD could make a case that service from a municipal utility is sufficiently different from that of a large investor-owned utility to satisfy the public need criteria.

In *Standish Telephone*, the Court affirmed the Commission's finding that there was a public need for the resale of tariffed services (WATS and FX) by an entity other than the currently serving telephone utility. Although the resale of WATS and FX is a long-distance telephone service, the Court found that it was a different service than the long-distance service offered by the existing utility. Specifically, the Court noted that, although the proposed service was "comparable" to the existing service, it differed in that the resold product would cost less, but provide inferior access in that more numbers would have to be dialed and there could be a wait until the reseller's circuits became available. *Standish Telephone*, 499 A.2d at 462 n.7.

Thus, the Court found that a service could be found to be "different" for purposes of the public need test, even if it is "comparable" to the existing service. The service proposed in *Standish Telephone* was essentially long distance telephone service. Existing utilities were providing long distance service and there was no allegation that the service quality was inadequate. The Court's decision was premised instead on the proposed service having certain features that differed from traditional long distance service (i.e. lower costs and inferior access to the network). In a similar manner, KLPD could demonstrate that its distribution service has features (e.g. local control and greater responsiveness) that differentiates it from CMP's service to a large enough extent so that a finding could be made that the proposed service, although

“comparable” to the existing service, is a different service for purposes of the public need test.

In stating this conclusion, we emphasize two points. First, we are not accepting any suggestion that lower price or public “demand” alone in a second utility case can satisfy the “public need” criterion. Such a conclusion would be contrary to a coherent public utility system that includes geographically defined service territories. If lower price or public demand alone could satisfy the criteria, customers (or utilities) would continually seek to alter service territory authorizations to obtain service at a lower cost or other perceived benefits. Public need requires that the proposed service be a different service than that currently provided. Second, although *Standish Telephone* reveals that a comparable service with different features could constitute a new service for purposes of the “public need” criteria, the inquiry in this case is not limited to the public need for KLPD’s service. As mentioned above, an examination of the public convenience and necessity in this case would include other public interest considerations, such as the impact on CMP and its ratepayers and the potential for wasteful duplication of facilities. Thus, it is possible that a “public need” could be found, but that other public interest concerns would lead to the conclusion that KLPD should not obtain its requested authority to serve.<sup>4</sup>

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<sup>4</sup> For example, although a public need could be found, the Commission could decide that authority to serve should not be granted because of undue harm to CMP and its ratepayers or the lack of adequate assurances that inefficient duplication of facilities will not occur.



C. Forced Sale and Imprudence Price

There has been some confusion in this proceeding as to whether KLPD is seeking Commission action that would directly or indirectly require CMP to sell its facilities located in the Town of Kennebunk. In its comments on the threshold issues, KLPD has categorically stated that it does not seek a forced sale in this proceeding. Thus, issues relating to a forced sale of CMP assets will not be addressed in this proceeding.

KLPD has also denied that its request for the Commission to establish an "imprudence price" is an attempt to indirectly force CMP to sell its assets. However, we fail to understand KLPD's stated explanation for its request that an "imprudence price" be established. The point of establishing an "imprudence price" would appear to be a communication to a utility that issues of prudence may be raised if it refused to sell assets at the established price. Such action could reasonably be viewed as an attempt to coerce the utility to sell its assets and would certainly implicate the Law Court's holding in *Maine Public Service Company v. Public Utilities Comm'n*, 524 A.2d 1222 (Me. 1987). Thus, in view of KLPD's statement that it does not seek a forced sale either directly or indirectly, we conclude that the establishment of an "imprudence price" will not be at issue in this proceeding.

Although an "imprudence price" will not be established in this proceeding, we conclude that a determination of prices for CMP's facilities that will keep it and its ratepayers financially neutral in the event KLPD serves the entire Town of Kennebunk is an appropriate inquiry in this proceeding. These "financially neutral" or "hold harmless" prices would include the fair value for the assets themselves, appropriate level of

generation-related stranded costs, and any other cost to CMP that would result from the loss of its Kennebunk customers. The establishment of these prices should not be construed as an attempt to compel CMP to sell its distribution assets. Rather, the determination of such prices will aid in the assessment of KLPD's petition in light of the overall public interest and could allow us to fashion appropriate conditions to the granting of authority.<sup>5</sup> Our determination that "financially neutral" or "hold harmless" prices should be examined in this proceeding, however, should not be viewed as any indication that the Commission has concluded that such prices must be paid for authority to be granted or that CMP and its ratepayers must be kept financially whole. Final decisions on all matters in this proceeding will be made only after the development of a full record and consideration of all arguments.

D. Issues to be Addressed

We conclude by listing issues that should be addressed in this proceeding. The listing of these issues will not preclude parties from raising other relevant issues as this proceeding progresses. Issues relevant to the resolution of this proceeding are as follows:

- Is there is a public need for KLPD's proposed service? Is KLPD's proposed service sufficiently different from that currently provided to satisfy the public need criterion?
- Does KLPD have the technical capability to provide the proposed service?
- Does KLPD have the financial capability to provide the proposed service?

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<sup>5</sup> For example, the Commission could decide to condition the granting of authority on CMP's agreement to sell facilities at prices that will keep its ratepayers financially neutral.

-What is the impact of KLPD's proposed service on CMP and its ratepayers? What are the prices for CMP's distribution facilities that will keep CMP and its ratepayers financially neutral to KLPD's proposed service?

-Does KLPD's proposed service create increased efficiencies? Can KLPD provide service at a lower cost than CMP?

-Does KLPD's proposed service create the potential for the inefficient duplication of facilities? If so, how can concerns over the duplication of facilities be alleviated?

-Is it in the public interest for CMP and KLPD to compete for individual customers? If not, should authority to provide service be granted only if there is an acceptable arrangement whereby CMP agrees to abandon service in the Town of Kennebunk?

The Examiners in this proceeding will convene a conference of parties in the near future to discuss the schedule for finally resolving the issues presented by the KLPD petition.

Respectfully submitted,

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Mitchell Tannenbaum

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Peter Ballou  
Hearing Examiners